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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ARTHUR LEE GARRISON,

Plaintiff

v.

A. GREGERSON, et. al.,

Defendants

Case No.: 3:17-cv-00391-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 247

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' Motion for Summary Judgment. (ECF Nos. 247, 247-1 to 247-12, 249-1 to 249-4.) The motion was served on Plaintiff on January 21, 2021. (ECF No. 247 at 13.) On January 22, 2021, District Judge Du issued an order advising Plaintiff of the requirements for opposing the motion for summary judgment, and ordered the opposition to be filed within 21 days. (ECF No. 251.) Plaintiff did not file a response to the motion for summary judgment. Plaintiff did file a document he titled "Motion to Show Just Cause for Jury Trial" (ECF No. 246), but this was filed the day *before* Defendants' filed and served their motion for summary judgment; therefore, it could not be a response to the motion. Defendants nevertheless treated it as such, and filed a reply brief. (ECF No. 258). That document does address each of Plaintiff's claims, and because Plaintiff is proceeding pro se, the court will also treat it as his response to Defendants' dispositive motion.

1 After a thorough review, it is recommended that Defendants' motion be granted.

2 **I. BACKGROUND**

3 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
4 proceeding pro se with this action pursuant to 42 U.S.C. § 1983. The events giving rise to this
5 action took place while Plaintiff was housed at High Desert State Prison (HDSP) and Ely State
6 Prison (ESP). This action is proceeding on the Fourth Amended Complaint. (ECF No. 129.)

7 The court screened the Fourth Amended Complaint and allowed Plaintiff to proceed with
8 a claim under the Eighth Amendment for deliberate indifference to his serious medical need
9 concerning his throat/sinuses as well as a retaliation claim related to allegations concerning
10 medical care for his throat/sinus issues and a transfer from HDSP to ESP. (ECF No. 128.)

11 The Eighth Amendment claim was allowed to proceed against defendants Brown,
12 Matousek, Stoke, Dr. Koehn, A. Gregerson, Melissa Mitchell, Dr. Schlager, Dr. Romeo Aranas,
13 and Dr. Scott Manthei. Plaintiff was allowed to proceed with claims for retaliation against
14 Mitchell, Neven, Russell, and Smith. (*Id.*)

15 Stoke, Smith and Dr. Schlager have been dismissed without prejudice for failure to
16 timely serve them under Federal Rule of Civil Procedure 4(m). (ECF Nos. 237, 244.) Therefore,
17 this action is proceeding against Dr. Romeo Aranas, Guy Brown, Angela Gregerson, Dr. Scott
18 Manthei, Julie Matousek, Melissa Mitchell, Dwight Neven, and Perry Russell.

19 Defendants move for summary judgment, arguing that they were not deliberately
20 indifferent to Plaintiff's serious medical needs, Plaintiff was not retaliated against, and
21 alternatively, they are entitled to qualified immunity.

II. LEGAL STANDARD

1
2 The legal standard governing this motion is well settled: a party is entitled to summary
3 judgment when “the movant shows that there is no genuine issue as to any material fact and the
4 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
5 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the
6 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
7 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome
8 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
9 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
10 other hand, where reasonable minds could differ on the material facts at issue, summary
11 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

12 “The purpose of summary judgment is to avoid unnecessary trials when there is no
13 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
14 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
15 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477
16 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that
17 one party must prevail as a matter of law”). In considering a motion for summary judgment, all
18 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
19 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
20 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the
21 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,
22 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
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1 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
2 *Anderson*, 477 U.S. at 249.

3 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
4 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
5 come forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial.’ ... In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
9 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
10 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
11 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party cannot establish an element essential to that party’s case on which that party will have the
13 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

14 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
15 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
16 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
17 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
18 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”
19 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
20 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
21 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
22 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
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1 pleadings and set forth specific facts by producing competent evidence that shows a genuine
2 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

3 **III. DISCUSSION**

4 **A. Preliminary Matters**

5 **1. Rule 56(d)**

6 In his filing, Plaintiff states, without any elaboration, that the motion should be denied if
7 a party has not had an opportunity to make discovery, and that because the Fourth Amended
8 Complaint has not yet been screened, he has not had an opportunity to conduct discovery. (ECF
9 No. 246 at 4.) Plaintiff is mistaken. Plaintiff filed his original complaint on June 22, 2017. (ECF
10 Nos. 1-1 to 1-14.) He then filed an amended complaint (first amended complaint or FAC) on July
11 6, 2017, followed by various exhibits. (ECF Nos. 3, 4, 4-1, 5.) The FAC was dismissed without
12 prejudice, and leave to amend was deferred while the court ruled on his motions for appointment
13 of counsel/guardian ad litem. (ECF No. 9.) On July 23, 2018, the court denied the motion for
14 appointment of counsel/guardian ad litem, and allowed Plaintiff to file a second amended
15 complaint (SAC). (ECF No. 18.) Plaintiff filed his SAC on August 14, 2018. (ECF No. 22.) The
16 SAC was dismissed with leave to amend. (ECF No. 32.) Plaintiff then filed his third amended
17 complaint (TAC) on November 27, 2018. (ECF No. 34.) The court screened the TAC and
18 allowed some claims to proceed, but dismissed others with and without prejudice. (ECF No. 35.)
19 The case was then stayed while the parties participated in an early mediation conference, but the
20 parties were unsuccessful in settling the case. (ECF No. 43.) Defendant Matousek filed her
21 response to the TAC on June 20, 2019. (ECF No. 49.)

22 The court entered a scheduling order the following day, giving the parties until
23 September 19, 2019, to complete discovery. (ECF No. 50.) On the defense's request, the court

1 extended the discovery completion deadline to November 8, 2019. (ECF No. 64.) Then, on
2 Plaintiff's request, the court extended the discovery completion deadline to January 7, 2020.
3 (ECF No. 87.) On December 2, 2019, Plaintiff filed his motion for leave to file the Fourth
4 Amended Complaint. (ECF No. 101.) On February 24, 2020, the court granted the motion to file
5 the Fourth Amended Complaint, screened the Fourth Amended Complaint, and vacated the
6 scheduling order deadlines. (ECF No. 128.) On April 8, 2020, the court entered a new
7 scheduling order, with a new discovery completion deadline of July 7, 2020. (ECF No. 140.) On
8 Plaintiff's request, the court extended the discovery completion deadline by 90 days to October 5,
9 2020. (ECF No. 145.) In that order, the court said there will be no further extensions barring
10 unforeseen and extenuating circumstances. (*Id.*) Therefore, Plaintiff has had an opportunity to
11 conduct discovery.

12 Plaintiff then filed a motion where it appeared that he sought to further extend the
13 discovery completion deadline, but the motion was 139 pages in length, and attached numerous
14 grievances. Plaintiff did not state what additional discovery he sought to propound, he failed to
15 comply with Local Rule 26-3, and he did not explain what circumstances justified a further
16 extension. Therefore, the October 5, 2020 discovery completion deadline remained in place.
17 (ECF No. 180.)

18 Plaintiff did not subsequently file a motion that set forth sufficient grounds for extending
19 the discovery completion deadline any further. To the extent his statement in this filing can be
20 construed as a request under Federal Rule of Civil Procedure 56(d), it is likewise insufficient.
21 Plaintiff has not shown by affidavit or declaration that he cannot present facts needed to oppose
22 Defendants' motion. Nor has he explained "what further discovery would reveal that is essential
23 to justify [his] opposition to the motion[.]" *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir.

1 2018) (citation and quotation marks omitted). Plaintiff was required to state "what other *specific*
2 evidence" he hopes to discovery and the "relevance of that evidence to [his] claims." *Id.* (citation
3 and quotation marks omitted, emphasis original).

4 For these reasons, Plaintiff's request to deny the motion under Rule 56(d) should be
5 denied.

6 **2. Plaintiff's Request to Strike Certain Documents**

7 Plaintiff asks that certain documents be stricken, including: ECF No. 116-2; ECF No.
8 116-1 at 1-4; ECF No. 116-6 at 1-2; ECF No. 116-4 at 1-20.

9 ECF No. 116-2 is an Investigation Detail Report concerning an incident where Plaintiff
10 was found to have a prison-made weapon ("shank"). ECF No. 116-1 contains Plaintiff's historical
11 bed assignments. ECF No. 116-4 is a redacted offender information summary. ECF No. 116-6 is
12 a June 23, 2015 incident report regarding an incident where Plaintiff was found to have
13 contraband hidden in his property, including prison-made weapons. These were exhibits to a
14 prior motion for summary judgment that was denied as moot when Plaintiff was granted leave to
15 file his Fourth Amendment Complaint.

16 In any event, the court has already ordered ECF Nos. 116-2, 116-4 and 116-6 sealed.
17 (ECF No. 131.) Plaintiff has not set forth any additional basis for striking these documents.

18 The court previously ruled that it found no basis for sealing or striking Exhibit A (ECF
19 No. 116-1), the historical bed assignments, and Plaintiff has not presented any further basis for
20 sealing or striking this document. (ECF No. 128.)

21 In sum, Plaintiff's current request to strike these documents should be denied.
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1 **B. Eighth Amendment**

2 **1. Standard**

3 "The government has an 'obligation to provide medical care for those whom it is
4 punishing by incarceration,' and failure to meet that obligation can constitute an Eighth
5 Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 753 F.3d 1060, 1066 (9th
6 Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)).

7 A prisoner can establish an Eighth Amendment violation arising from deficient medical
8 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
9 *Estelle*, 429 U.S. at 104. A claim for deliberate indifference involves the examination of two
10 elements: "the seriousness of the prisoner's medical need and the nature of the defendant's
11 response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other*
12 *grounds, WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also Akhtar v. Mesa*, 698
13 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)).
14 "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further
15 significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*, 974 F.2d at
16 1059 (citing *Estelle*, 429 U.S. at 104); *see also Akhtar*, 698 F.3d at 1213.

17 If the medical need is "serious," the plaintiff must show that the defendant acted with
18 deliberate indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation
19 omitted). "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051,
20 1060 (9th Cir. 2004). Deliberate indifference entails something more than medical malpractice or
21 even gross negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action
22 under section 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present
23 when a prison official "knows of and disregards an excessive risk to inmate health or safety; the

1 official must both be aware of the facts from which the inference could be drawn that a
2 substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*,
3 511 U.S. 825, 837 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

4 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally
5 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
6 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
7 quotation marks and citation omitted).

8 Where delay in receiving medical treatment is alleged, a prisoner must demonstrate that
9 the delay led to further injury. *McGuckin*, 974 F.2d at 1060.

10 "A difference of opinion between a physician and the prisoner—or between medical
11 professionals—concerning what medical care is appropriate does not amount to deliberate
12 indifference." *Snow*, 681 F.3d at 987 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)).
13 Instead, to establish deliberate indifference in the context of a difference of opinion between a
14 physician and the prisoner or between medical providers, the prisoner "'must show that the
15 course of treatment the doctors chose was medically unacceptable under the circumstances' and
16 that the defendants 'chose this course in conscious disregard of an excessive risk to plaintiff's
17 health.'" *Snow*, 681 F.3d at 988 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

18 **2. Medical Evidence**

19 Plaintiff complained of swollen lumps and a sore throat on July 18, 2014, and he was
20 referred to a medical provider. (ECF No. 249-1 at 28.) He was seen on October 10, 2014, with a
21 notation that his symptoms continued despite completing antibiotic treatment. He was diagnosed
22 with chronic pharyngitis, and was prescribed Erythromycin and Chloraseptic. (ECF No. 249-1 at
23 27.) He was seen on October 23, 2014, and it was noted he had no improvement after being on

1 antibiotics for ten days. He was referred to Dr. Holmes to assess his hoarseness, and for a
2 possible referral to an ENT. (ECF No. 249-1 at 26.) He saw Dr. Holmes on November 13, 2014,
3 who requested referral to an ENT. (ECF No. 249-1 at 25; ECF No. 249-2 at 71.)

4 Plaintiff saw seen at Nevada Ear & Sinus on February 20, 2015. Defendants reference a
5 Dr. Sean Palacios, but the provider Plaintiff saw is listed as Dr. Scott Manthei (and another
6 record reveals that Dr. Palacios is the medical director for Nevada Ear & Sinus).(ECF No. 249-2
7 at 35.) Plaintiff complained of a raspy voice for one year and pain swallowing, with the feeling
8 of a persistent foreign body in the throat. He had been on multiple antibiotics without relief.
9 Dr. Manthei observed a lingual cyst. Plaintiff was diagnosed with acute pharyngitis and
10 nasopharyngitis. He recommended a three week course of Clindamycin, noting that it should
11 help resolve Plaintiff's symptoms. If the antibiotic failed to relieve the symptoms, Dr. Manthei
12 recommended a CAT scan of the paranasal sinuses. If the symptoms persisted, he would follow
13 up with Plaintiff. (ECF No. 249-2 at 15-17.)

14 On March 18, 2015, it was noted Plaintiff was only taking half of the dose of
15 Clindamycin, he was advised to take the antibiotic and was prescribed Chloraseptic.
16 (ECF No. 249-1 at 25.)

17 Plaintiff was received at ESP from HDSP on June 10, 2015. (ECF No. 249-1 at 24.) He
18 saw Dr. Koehn on June 17, 2015, regarding the throat cyst that had been identified by
19 Dr. Manthei. It was noted that the issued antibiotics had no effect on Plaintiff's symptoms.
20 Dr. Koehn said he would get Plaintiff's medical history from the records (that were presumably
21 being sent from HDSP) and then would consider a repeat consultation with the ENT.
22 (ECF No. 249-1 at 24.)

23 Dr. Koehn requested a referral to the ENT for a follow up on July 27, 2015.

1 (ECF No. 249-2 at 55.) This was approved, and an appointment was scheduled with Dr. Manthei
2 on September 11, 2015. (*Id.*) There is also a referral for a sinus CT scan to be sent to
3 Dr. Manthei, and this was approved on September 10, 2015. (ECF No. 249-2 at 48.)

4 Plaintiff saw Dr. Manthei again on September 11, 2015, and noted that Plaintiff did not
5 feel better after the round of Clindamycin. Dr. Manthei recommended surgery including a left
6 sphenoidotomy, and direct laryngoscopy and removal of the lingual cyst as well as
7 esophagoscopy. Dr. Manthei said he saw no indication for further antibiotics as there had been
8 no change with his symptomatology, and there was a risk of developing a super bug. Plaintiff
9 would, however, be placed on post-operative antibiotics prophylactically. (ECF No. 249-2 at 4-
10 5.) Plaintiff was given Tylenol for his pain on September 23, 2015. (ECF No. 249-1 at 23.)

11 Plaintiff had the surgery on October 14, 2015. (ECF No. 249-2 at 9-14.) On October 22,
12 2015, he reported his voice was slightly hoarse, but it was improving. (ECF No. 249-1 at 22.)

13 Plaintiff saw Dr. Manthei following surgery on October 26, 2015, and it was noted he
14 was doing well after surgery. The pathology was benign, and Dr. Manthei said there was no
15 follow up necessary. (ECF No. 249-2 at 2.)

16 On December 29, 2015, Plaintiff complained of throat issues, and he was scheduled with
17 a provider. (ECF No. 249-1 at 19.)

18 Plaintiff was seen on January 25, 2016, for complaints of voice box pain. His thyroid
19 palpated firm to the touch bilaterally, but there were no cysts or lumps at the collarbone where he
20 had complained. (ECF No. 249-1 at 18.) He was given Chloraseptic for throat irritation on
21 January 29, 2016. (ECF No. 249-1 at 17.)

22 He was seen on September 19, 2016, for complaints of nasal congestion and a hoarse
23 voice and feeling of fullness in his throat. He was assessed with allergic rhinitis and history of a

1 cyst. He was referred to Dr. Baker to assess for possible referral to an ENT. (ECF No. 249-1 at
2 16.)

3 Plaintiff complained of voice hoarseness again on October 12, 2016. He had no
4 observable polyps, lesions or masses. He was referred to an ENT to rule out polyps. He was
5 prescribed Cipro and a nasal spray. (ECF No. 294-1 at 15; ECF No. 249-3 at 20; ECF No. 249-2
6 at 47.) On November 18, 2016, he was scheduled to see Dr. Schlager. (ECF No. 249-1 at 14.) He
7 saw Dr. Schalger, and a CT of the soft tissue of the neck was ordered. (ECF No. 249-2 at 22, 23,
8 45.) This was authorized. (*Id.*; ECF No. 249-2 at 44.) A note on October 11, 2017, indicates that
9 the CT was done and was normal, but Plaintiff's symptoms continued. (ECF No. 249-2 at 43.)
10 Plaintiff failed to show up for his appointment on December 11, 2017. (ECF No. 249-1 at 8.)

11 **3. Dr. Aranas**

12 Plaintiff alleges that Dr. Aranas said he would make sure Plaintiff received all necessary
13 treatment, but sided with the other defendants and did not ensure Plaintiff received treatment.

14 Dr. Aranas does not recall having any direct interaction with Plaintiff, and never treated
15 Plaintiff nor denied him medical care. Other than responding to grievances, he had no contact
16 with Plaintiff. (Dr. Aranas Decl., ECF No. 247-11 at 3.)

17 Plaintiff provides evidence that Dr. Aranas responded to Plaintiff's second level
18 grievance (grievance 20063016500) around June 22, 2017, stating that Plaintiff had a sinus
19 infection and an abscess, which required surgical intervention and IV antibiotics, but Plaintiff
20 had not demonstrated his rights had been infringed upon, or that NDOC procedures were
21 violated or that he suffered harm. The grievance was nevertheless partially granted. (ECF No.
22 246 at 48.)
23

1 Plaintiff does not provide the actual grievance that he sent to which Dr. Aranas
2 responded; however, Dr. Aranas' response that Plaintiff had a sinus infection and abscess that
3 required surgical intervention and IV antibiotics does not demonstrate Dr. Aranas was
4 deliberately indifferent to a serious medical need. At most, it reveals that Dr. Aranas reviewed
5 Plaintiff's medical file and advised Plaintiff what had occurred. This does not establish that he
6 knew of and disregarded a risk to Plaintiff's health. Therefore, summary judgment should be
7 granted in Dr. Aranas' favor.

8 **4. Dr. Scott Manthei**

9 Plaintiff alleges that Dr. Manthei did not give Plaintiff antibiotics or anything for his pain
10 when he was transferred back to HDSP on September 9, 2015, and on September 10, 2015, his
11 scan showed a massive infection. The next day, Plaintiff was told he required surgery related to
12 the infection and cyst.

13 Dr. Manthei states that he treated Plaintiff, on a contract basis, regarding his sinus
14 infection issues. Prior to seeing Plaintiff on September 11, 2015, Plaintiff was taking
15 Erythromycin, an antibiotic. After Dr. Manthei's examination, he recommended a direct
16 laryngoscopy, and removal of a lingual cyst as well as an esophagoscopy. Dr. Manthei did not
17 see an indication for further antibiotics as there was no change in his symptomology and there
18 would be a risk of developing a super bug. Plaintiff was placed on post-operative antibiotics
19 prophylactically. (Mathei Decl., ECF No. 247-12.)

20 Plaintiff does not point to any medical records that contradict Dr. Manthei's statements in
21 his declaration. Nor does he point to any evidence that substantiates his allegation that
22 Dr. Manthei was deliberately indifferent to a serious medical need. Therefore, summary
23 judgment should be granted in Dr. Manthei's favor.

1 **5. Dr. Koehn**

2 Plaintiff alleges that on June 12, 2015, Dr. Koehn told Plaintiff he did not have the
3 medical file and laughed and told Plaintiff, "If I don't diagnose your problems I never need to
4 treat them." He avers that Dr. Koehn refused to give him any treatment until August 2015, and
5 said he did not care if Plaintiff was treated or not. When Plaintiff told Dr. Koehn his throat was
6 in pain, he claims Dr. Koehn said he was tired of inmates and did not care about Plaintiff's pain.

7 Plaintiff does not submit a declaration to substantiate his allegations against Dr. Koehn.
8 Instead, Plaintiff's medical records contradict Plaintiff's allegations, and demonstrate that
9 Plaintiff saw Dr. Koehn shortly after he arrived at ESP. Dr. Koehn noted that the antibiotics
10 Plaintiff had previously been prescribed had not helped his symptoms, and said that he would get
11 Plaintiff's medical records (which were presumably being transferred to ESP from HDSP), and
12 would consider a repeat consultation with Dr. Manthei. Not long thereafter, Dr. Koehn requested
13 a referral to the ENT for a follow up, which was approved, and Plaintiff was scheduled to see
14 Dr. Manthei on September 11, 2015. Plaintiff was also approved for a sinus CT the day before
15 his appointment with Dr. Manthei.

16 There is no evidence that Dr. Koehn was deliberately indifferent to Plaintiff's serious
17 medical need; therefore, summary judgment should be granted in Dr. Koehn's favor.

18 **6. Melissa Mitchell**

19 Plaintiff alleges Mitchell was deliberately indifferent because it took Plaintiff 11 months
20 to get a CAT scan.

21 In her declaration, Mitchell says she has no recollection of any encounter with Plaintiff,
22 and as a registered nurse, is not responsible for scheduling outside appointments or diagnostic
23

1 consultations. She is not a member of the Utilization Review Panel (URP), and has no input on
2 the approval of any medical procedure or appointment. (Mitchell Decl., ECF No. 247-9.)

3 In his response, Plaintiff says that Mitchell was overheard saying she "wanted that piece
4 of shit out of her prison." Plaintiff gives no context to this statement, or state who overheard her
5 make this statement, or when it occurred. Plaintiff also states that he filed a grievance against
6 Mitchell and she told him there was nothing wrong with him and he would be treated when she
7 decided. Plaintiff does not provide a copy of this grievance or response. Nor does he provide any
8 other evidence to support his claim that she was deliberately indifferent with respect to his
9 medical care. Importantly, Plaintiff has not submitted evidence that raises a dispute of fact as to
10 whether Mitchell had any input into the scheduling of CAT scans, which is the basis of his
11 Eighth Amendment claim against her. Therefore, summary judgment should be granted in
12 Mitchell's favor.

13 **7. Guy Brown**

14 In his Fourth Amended Complaint, Plaintiff alleges that Brown transferred him to a non-
15 medical unit on October 18, 2015, after he had major surgery on his throat on October 14, 2015,
16 and that this was against doctor's orders that he be housed in a medical building. Plaintiff
17 contends this resulted in severe pain, a lack of medications and food, vomiting and diarrhea that
18 required several rounds of intravenous fluids over three days. He avers that a doctor
19 subsequently told him he should not have been moved.

20 Plaintiff does not point to any evidence to corroborate his bare allegations. Moreover, his
21 medical records do not reflect any orders that he was ordered to be housed in the medical
22 building, or that a doctor said he should not have been moved. Nor is there evidence that moving
23 him outside the medical building caused him to suffer in pain or caused his other symptoms.

1 Furthermore, there is no evidence of Brown's involvement in the move, or even if he was
2 involved, that Brown moved him in disregard of a risk to Plaintiff's health. Therefore, summary
3 judgment should be granted in Brown's favor.

4 **8. Julie Matousek**

5 Plaintiff alleges that Matousek threw away his medications, and he suffered in pain and
6 developed an infection as a result.

7 There is absolutely no evidence in the record that Matousek threw away Plaintiff's
8 medications. Therefore, summary judgment should be granted in Matousek's favor.

9 **9. A. Gregerson**

10 In the Fourth Amended Complaint, Plaintiff alleges that Gregerson told him she would
11 get him throat medication, but it took over two months to provide the medications.

12 In his response, Plaintiff asserts that Gregerson took months to refill his Chloraseptic
13 throat spray when he was back at ESP in December of 2015.

14 Plaintiff's medical records reflect that Plaintiff complained of throat issues on December
15 29, 2015, and he was scheduled with a provider. (ECF No. 249-1 at 19.) Plaintiff was seen on
16 January 25, 2016, and was given Chloraseptic for throat irritation on January 29, 2016. (ECF No.
17 249-1 at 17.) Therefore, a month passed in between when Plaintiff complained of pain and when
18 he was seen and given Chloraseptic, which contradicts Plaintiff's bare allegation that Gregerson
19 took months to give him the medication. Moreover, there is no evidence that Plaintiff
20 complained to Gregerson between the time he complained of throat pain at the end of December
21 2015, and when he received the throat medication at the end of January 2016. In the absence of
22 evidence of deliberate indifference, summary judgment should be granted in Gregerson's favor.
23

1 C. Retaliation

2 1. Standard

3 "Section 1983 provides a cause of action for prison inmates whose constitutionally
4 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791
5 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a
6 claim consists of the following elements: "(1) An assertion that a state actor took some adverse
7 action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action
8 (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
9 reasonably advance a legitimate correctional goal." *Jones*, 791 F.3d at 1035 (quoting *Rhodes v.*
10 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

11 2. Mitchell

12 Plaintiff alleges that in November of 2016, Mitchell was the subject of his grievances,
13 and when he was waiting for a CAT scan Mitchell told him, "snitchy grievance filing inmates
14 don't deserve treatment." In addition, he claims that she told him he would not get treatment
15 because he filed a lawsuit and she was on the committee.

16 Mitchell states in her declaration that she has no recollection of any encounter with
17 Plaintiff, and never said anything remotely similar to Plaintiff's allegations. In addition, she is not
18 a member of the URP and has no bearing or input on the approval of medical procedures or
19 appointments and is not responsible for scheduling outside appointments or diagnostic
20 consultations. (Mitchell Decl., ECF No. 247-9.)

21 In his response, Plaintiff merely repeats his allegation that Mitchell told him grievance-
22 filing inmates do not deserve treatment, but he provides no evidence regarding when she
23 allegedly made this statement. Moreover, he provides no evidence that Mitchell actually took

1 any adverse action against him as a result of filing grievances. He does not point to anything to
2 substantiate his claim that she had any involvement in a purported delay of his CAT scan. Nor is
3 there any other evidence that Mitchell took any adverse action against him. Therefore, summary
4 judgment should be granted in Mitchell's favor.

5 **3. Neven and Russell**

6 Plaintiff alleges that Neven was the subject of several grievances Plaintiff had filed, and
7 another correctional officer told plaintiff, "you know better than to file grievances against
8 Neven." Plaintiff claims that Neven transferred Plaintiff from HDSP to ESP while Plaintiff was
9 still waiting for medical treatment because Plaintiff had accused Neven of theft. Staff at ESP
10 purportedly told Plaintiff he messed up by filing grievances against Neven because Neven used
11 to be the warden at ESP and still had power there.

12 Plaintiff alleges that Russell informed Plaintiff he was sick of Plaintiff filing grievances,
13 and would ensure that Plaintiff disappeared. Plaintiff later asked Russell why he was being
14 treated so poorly, and Russell told Plaintiff that he would not be treated well no matter what.
15 Plaintiff avers that Russell subsequently ordered him transferred to ESP.

16 According to Defendants, on March 18, 2014, HDSP staff discovered Plaintiff had a
17 prison-made weapon (shank) in his possession, and as a sanction, Plaintiff received 180 days in
18 disciplinary segregation and was transferred to ESP. After serving additional disciplinary
19 segregation time for further infractions, Plaintiff returned to HDSP in September 2015 for
20 medical treatment.

21 The evidence reflects that Plaintiff was at HDSP, and on March 18, 2014, he was
22 discovered to have a prison-made weapon (a "shank") in his possession. (ECF No. 247-2 at 2.)
23 Plaintiff was found guilty of the charge and was sanctioned to 180 days in disciplinary

1 segregation (DS). (ECF No. 247-3 at 2.) Plaintiff was brought into administrative segregation
2 (ad-seg) at HDSP due to his pending disciplinary charge, and it was noted that he needed to have
3 a full classification committee hearing for proper placement as it appeared he was unable to go to
4 general population (GP). He would remain in close custody in ad-seg pending the outcome of the
5 disciplinary charge and full classification committee review. (ECF No. 247-7 at 11.)

6 Plaintiff was charged with another disciplinary offense on March 29, 2015, while still at
7 HDSP, but he was found not guilty. (ECF No. 247-3 at 2; ECF No. 247-4 at 2.) On April 29,
8 2014, Plaintiff was still in ad-seg pending his disciplinary charge. There is a notation on May 15,
9 2014, that Plaintiff was found guilty of the May 18, 2014 charge and was sanctioned with 180
10 days in DS, which would expire on November 11, 2014. (ECF No. 247-7 at 11.) There is a
11 notation on July 3, 2014, that there was a meeting with Plaintiff to discuss his DS time and a
12 "possible early kick out." It was noted Plaintiff did not want to go to GP, so he would continue
13 his DS time. (*Id.*)

14 On August 15, 2014, there is a note that "t/c" was given on this date (presumably
15 referring to a time cut), and his "out date" from DS was adjusted to October 12, 2014. He was
16 still at HDSP at this time. A notation on October 6, 2014, indicated that Plaintiff had completed
17 his DS time, and he was then placed in ad-seg pending a full classification committee review for
18 proper placement. (*Id.*) On October 9, 2014, it was indicated that Plaintiff did not feel safe in GP
19 and needed to be re-classified to close custody ad-seg at *Lovelock Correctional Center (LCC)*.
20 (*Id.*) The members of the committee that made that determination were Barrett, Nash and Scott.
21 On October 27, 2014, it was formally recommended that Plaintiff be transferred to close custody,
22 ad-seg at LCC. (*Id.*)

1 Between November 17, 2014, and May 4, 2015, Plaintiff was pending approval for
2 transfer to LCC. (*Id.* at 12.) Russell updated the case note on May 6, 2015, stating that Plaintiff
3 was okay in HDSP close custody, ad-seg while pending transfer to LCC. (*Id.*)

4 There is a case note dated June 5, 2015, stating that Plaintiff was serving 180 days DS for
5 a guilty charge that started May 16, 2015, and his "out date" for DS was November 16, 2015. (*Id.*
6 at 13.) There is also an updated case note on June 8, 2015, by N. Flores, that Plaintiff was
7 approved to transfer to *ESP* to finish his DS time, even though Plaintiff had already completed
8 his DS time for the March 2014 disciplinary charge and had been recommended for transfer to
9 *LCC*. (*Id.* at 12.)

10 On June 10, 2015, the case note states that Plaintiff was cleared for transfer from HDSP
11 to *ESP/LCC*. Plaintiff arrived at *ESP* on June 10, 2015, and the case note states that he was there
12 to serve DS time from a charge that occurred on March 18, 2014. The notation from June 11,
13 2015, states that on further review, Plaintiff had completed his DS time and would be housed as
14 "MLU" ad-seg until he could be reviewed for possible transfer to LCC, which is where he was
15 originally scheduled to go. (*Id.* at 13.) The case note from June 12, 2015, states that Plaintiff was
16 mistakenly approved for *ESP* DS, and that the committee would recommend transfer to LCC;
17 however, the case note was updated on July 29, 2015, by Moore, stating that Plaintiff now had
18 more DS to serve. (*Id.*) This is because Plaintiff faced disciplinary charges for possession of
19 contraband at *ESP* on June 23, 2015. (ECF No. 247-3 at 2; ECF No. 247-4 at 2.)

20 Plaintiff was sent to HDSP for medical treatment in September through November of
21 2015. (ECF No. 247-7 at 13-14.) He returned to *ESP* to complete his DS sanction on December
22 10, 2015. (*Id.* at 14.) His "out date" for that DS sanction was January 17, 2016. A case note on
23

1 December 24, 2015, indicates his DS sanction was suspended, and he was placed in ad-seg, and
2 remained there because he refused to double cell. (*Id.* at 14-15.)

3 In sum, the evidence reflects that Plaintiff completed his DS time for the March 18, 2014
4 disciplinary charge while still at HDSP, and then he was approved for transfer to LCC, but was
5 mistakenly sent to ESP. Once at ESP, this mistake was discovered, and Plaintiff was again
6 recommended for transfer to LCC, but then remained at HDSP because he was found guilty on
7 additional disciplinary charges stemming from the possession of contraband at ESP and had to
8 serve an additional disciplinary sanction. There is no evidence in the record to support any
9 contention that the mistaken transfer to ESP was actually a retaliatory move by Neven or Russell.
10 In fact, there is no evidence that Neven or Russell had any involvement in Plaintiff's move from
11 HDSP to ESP. Plaintiff's allegation that Neven and/or Russell were behind the move to ESP
12 appears to be entirely speculative.

13 In his declaration, Russell states he does not recall if he ever responded to any of
14 Plaintiff's grievances, but contends he has not threatened any inmate over grieving him or any
15 other person. If a grievance is inappropriate, Russell would reject it and the inmate would be
16 advised as to the reason and how to fix it. He maintains he never told Plaintiff he would ensure
17 Plaintiff would disappear. In addition, he did not have authority to order Plaintiff be transferred
18 to ESP as all transfers are initiated by Offender Management Division (OMD). (Russell Decl.,
19 ECF No. 247-10.)

20 Plaintiff provides no evidence to refute Russell's statements. Plaintiff points to an updated
21 case note entry made by Russell, which Plaintiff claims was somehow fraudulent; however, in
22 the May 6, 2015 case note, Russell merely stated that Plaintiff was okay in HDSP close custody
23 ad-seg while pending transfer to LCC.

1 There is no evidence that Neven or Russell retaliated against Plaintiff by moving him to
2 ESP. Therefore, summary judgment should be granted in their favor.

3 **IV. RECOMMENDATION**

4 IT IS HEREBY RECOMMENDED that the District Judge enter an order:


- 5 (1) **DENYING** Plaintiff's request under Rule 56(d);
6 (2) **DENYING** Plaintiff's request to strike certain documents; and
7 (3) **GRANTING** Defendants' motion for summary judgment.

8 The parties should be aware of the following:

9 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
10 this Report and Recommendation within fourteen days of being served with a copy of the Report
11 and Recommendation. These objections should be titled "Objections to Magistrate Judge's
12 Report and Recommendation" and should be accompanied by points and authorities for
13 consideration by the district judge.

14 2. That this Report and Recommendation is not an appealable order and that any notice of
15 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
16 until entry of judgment by the district court.

17
18 Dated: June 8, 2021

19 
20 William G. Cobb
21 United States Magistrate Judge
22
23